United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7314

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

MICHAEL JUDGE,
Plaintiff-Appellant,

v.

CITY OF BUFFALO,
Defendant-Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK,
CIVIL ACTION No. 1973-307.

BRIEF OF DEFENDANT-APPELLEE

LESLIE G. FOSCHIO,
Corporation Counsel,
Attorney for Defendant-Appellee,
1100 City Hall,
No. 65 Niagara Square,
Buffalo, New York 14202,
(716) 852-6650.

JAMES J. McLOUGHLIN,
Assistant Corporation Counsel,
Of Counsel.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-3457

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APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.
CIVIL ACTION NO. 1973-307.

BRIEF OF DEFENDANT-APPELLEE

Statement of Issues Presented for Review

1. Assuming that the Commission refused to certify the plaintiff because of his height, may he invoke the protection of the Law Enforcement Assistance Administration guideline?

2. Was there a genuine issue of fact concerning the basis for the Buffalo Municipal Civil Service Commission's refusal to certify the plaintiff as eligible for appointment to the position of Patrolman?

3. Does the Commission's determination not to certify the plaintiff as eligible for appointment to the position of Patrolman because of his automobile injuries present a federal question?

Statement of the Case

(References to Joint Appendix are noted as A_____.)

The plaintiff sought a judgment directing the City of Buffalo to appoint him to the position of Patrolman. He claimed that he was denied appointment because of his inability to meet a certain height standard established by the Buffalo Municipal Civil Service Commission, and that this standard violated his rights under the Constitution and laws of the United States.

In 1971, the City entered into an agreement with the State of New York to set up a Community Peace Officer Program which was to be funded by monies provided to the State through the Federal Law Enforcement Assistance Administration (*cf.* 42 U.S.C. Sections 3701 *et seq.* particularly Sections 3731-3738) (A 9-10). The Program was designed to provide a pool of Police Trainees for the position of Patrolman. Upon being qualified by the Buffalo Municipal Civil Service Commission, these trainees were to be appointed Patrolmen as vacancies in the permanent ranks opened.

In accordance with the provisions of Attachment "A" of the agreement, the Municipal Civil Service Commission amended its Rules to include appropriate coverage for the position of Community Peace Officer as follows (A 28-29):

> "10. Notwithstanding the foregoing provisions of this rule, a Community Peace Officer will be appointed for a probationary period until he completes at least one year of service as a Community Peace Officer and thereafter until a permanent vacancy occurs in the position of a Patrolman, at which time he shall automatically become a probationary Patrolman in said position without further written examination *provided he passes a satisfactory medical examination.* In computing the one year of service as a Community Peace

> Officer, temporary and/or provisional service will be included provided the candidate has passed the examination for Community Peace Officer and is appointed to said position in accordance with Civil Service Law." (Emphasis Supplied)

At the time that the Community Peace Officer Program was instituted, and also at the time that this action was commenced, the Commission had a Rule which required all candidates for the position of Patrolman to be at least 5′ 9″ tall (A 29). Subsequent to the commencement of this action, and for reasons unconnected with it, the Commission reduced the height requirement to 5′ 7″ on December 18, 1973, and on May 8, 1974, it further reduced the height standard (A 32).

The plaintiff, who is a white male, was one of those recruited. He passed the written and physical examinations for the position and was appointed a Community Peace Officer on December 16, 1971 (A 13). At that time he was 5′ 9″ (A 4).

On February 27, 1972, he was involved in an off-duty accident when he was struck by an automobile while he was crossing the street. He sustained a comminuted displaced fracture of the midshafts of the right tibia, and a displaced fracture of the distal left tibia and fibula. His attending physician performed reductions on both legs which resulted in some shortening and displacement at both fracture sites and a loss of height from approximately 5′ 9″ to 5′ 7″ (A 21-27).

On January 24, 1973, the plaintiff appeared for the second physical examination required by the Municipal Civil Service Commission's Rule (A 29). In reviewing the record of this examination the Commission noted that the plaintiff's height was measured as 5′ 7″ (A 29). Since the plain-

tiff could not have been accepted into the Program unless he was at least 5′ 9″, the Commission advised him of its finding as to his height (A 33, 57), and at the same time undertook an investigation to determine the reasons for this discrepancy (A 29). The Administrative Director of the Commission contacted the Police Administrator, and it was only then that the Commission learned of the plaintiff's accident and injuries (A 29), since the plaintiff had not disclosed this to the medical examiner at the time of his examination (A 17, 20). The plaintiff disputed this (A 51), but see (A 39).

The plaintiff then requested an opportunity to appear before the Commission to discuss the matter, and the Commission heard him on May 23, 1973 (A 29-30). At that time, it received permission from the plaintiff to examine the hospital records and medical reports of his accident. It then submitted them to its medical examiner for his review and evaluation (A 30). On or about June 1, 1973, the Commission's physician, having reviewed the hospital records and medical reports, recommended that the plaintiff be rejected as a candidate for the position of Patrolman because of the injuries he had sustained in his automobile accident (A 17-18). On June 7, 1973, the Commission notified the plaintiff that he had not passed the required physical medical examination, and that it could not approve his appointment to the position of Patrolman (A 37).

The plaintiff thereupon commenced this action on or about June 27, 1973, contending that the refusal to appoint him was not because of his injuries, but was rather because he had failed to meet the 5′ 9″ height requirement of the Commission. At about the same time the Commission directed the plaintiff to submit to a further examination by a disinterested Orthopedic Surgeon for an evaluation

of his physical condition (A 38). Following a review of the results of this examination, the Commission decided to adhere to its original determination (A 31). However, in October, 1973, the Commission again agreed to review the plaintiff's case and stated that it would certify him as eligible for appointment to the Patrolman's position if he would take and pass the same agility test which he had successfully taken in 1971 in connection with his entrance into the Community Peace Officers Program (A 31).

The plaintiff took the agility test on November 20, 1973, but failed to attain a passing mark (A 31, 41-45, 48).

On December 12, 1973, the plaintiff was again advised that the Commission would not certify him as eligible for appointment to the position of Patrolman because of his physical condition (A 49).

On or about the 15th day of April, the City moved to dismiss the complaint herein upon the ground that the Court lacked jurisdiction over the subject matter of the claims asserted in the complaint (A 2, 8). Thereafter, the Court directed the filing of further affidavits and exhibits (A 15-16). On April 23, 1975, the Court rendered a decision in the City's favor and entered judgment thereon (A 76-84).

This appeal followed.

ARGUMENT

Summary

The plaintiff has failed to raise a federal question either as a matter of law, or in the alternative, as a matter of fact.

Assuming *arguendo* that the Municipal Civil Service Commission refused to certify the plaintiff as eligible for appointment to the position of Patrolman because of his height, the plaintiff has no standing as a white male to invoke the protection of a Law Enforcement Assistance Administration guideline which is expressly designed to protect women, Mexicans, Puerto Ricans and Orientals from certain height requirements. He has failed to show how the alleged height requirement violated his rights as a white male.

However, even if the plaintiff may invoke the guideline, the facts in this case show indisputably that the Commission's refusal to certify him had nothing to do with his height, but instead was actually based upon an evaluation of his physical condition following a serious automobile accident. The issue of whether the Commission was right or wrong in concluding that the plaintiff's injuries prevented him from serving as a Patrolman in a satisfactory manner does not involve a federal question.

POINT I

If height is a factor in this case, the plaintiff has failed to show how the height standard violated his rights as a white male.

The plaintiff claimed that his rights under the Law Enforcement Assistance Administration (LEAA) Guideline of March 9, 1973 (38 C.F.R.P. 6115) and certain other unspecified constitutional and statutory provisions have been violated by the defendant. These latter presumably include the Fourteenth Amendment, the Law Enforcement Assistance and Criminal Justice Act (42 USC § 3701, *et seq.*), the Civil Rights Act of 1871 (42 USC § 1983), the Civil Rights Act of 1964 as amended (42 USC § 2000e, *et seq.*), and the Federally Assisted Programs Act (42 USC §2000d, *et seq.*).

The LEAA Guideline states that it is being issued to assist in the elimination of discrimination based on *national origin, sex* and *race* caused by the use of restrictive minimum height requirements. Subdivision 4 thereof reads:

> "4. *Requirement.* The use of minimum height requirements, which disqualifies disproportionately *women,* and persons of certain national origins and races, such as persons of *Mexican* and *Puerto Rican* ancestry, *oriental* descent, will be considered violative to this Department's regulations prohibiting employment discrimination." (Emphasis added).

§ 3766, Subsec. (c)(1) of the Law Enforcement Act reads:

> "(c)(1). No person in any State shall on the ground of *race, color, national origin,* or *sex* be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter." (Emphasis added).

§ 2000e-2, Subsec. (a) of the Civil Rights Act reads:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race, color, religion, sex,* or *national origin;* or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *race, color, religion, sex,* or *national origin.*" (Emphasis added).

§ 2000d of the Federally Assisted Programs Act provides:

> "No person in the United States shall, on the ground of *race, color* or *national origin,* be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Emphasis added).

The plaintiff is, in fact, a white male. He does not claim to be of Mexican, Puerto Rican or Oriental ancestry or descent (*cf.* LEAA Guideline). He does not claim that the Commission's height standards discriminate against him by reason of his race, color, national origin or sex (*cf.* 42 USC § 3766, Subsec. [c] [1]; 42 USC § 2000d), or by reason of the additional ground stated in 42 USC § 2000e-2, *viz.* religion.

In short, he has not placed himself within the zone of interests which the Constitution, the statutes, and the Guideline are designed to protect. But unless he does so, he has no standing to invoke their protection.

In *Data Processing Service v. Camp*, 397 US 150, 25 L Ed 2d 184 (1970), the Court stated that the question of standing involves (25 L Ed 2d 188):

> "• • • whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

In a companion case, *Barlow v. Collins*, 397 US 159, 25 L Ed 2d 192, the Court enunciated a two step approach in resolving the standing issue—(1) the plaintiff must allege that the challenged action has caused him injury in fact; and (2) the statute or constitutional provision must be examined to determine whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated. *Cf. Sierra Club v. Morton*, 405 US 727, 733; 31 L Ed 2d 636, 642 (1972).

When the plaintiff's situation as a white male is measured against the constitutional and statutory protections which he seeks to invoke, it is evident that he is not within the zones of interest intended to be protected.

POINT II

Height is not at issue in this action. No federal question is presented to support jurisdiction.

The gravamen of the plaintiff's complaint is that he has been deprived of his constitutional rights by reason of the Municipal Civil Service Commission's invalid height standard.

However, the record clearly establishes that the Commission's determination was based upon its evaluation of the plaintiff's physical condition following his accident.

The medical examiner for the Commission recommended to the Commission on or about June 1, 1973 that the plaintiff be rejected because of the injuries which he had sustained in his automobile accident (A 17-18). The Commission accepted this recommendation, and on June 6, 1973, it informed the plaintiff that it would not certify him because of his physical condition (A 36, 37). The President of the Commission stated that the refusal to certify the plaintiff was because he had not met the medical and physical standards established by the Commission—that the refusal was not based upon the plaintiff's height, *and that his failure to meet a minimum height requirement would not be urged as a defense to the action* (A 13-14). The Administrative Director of the Commission declared that the Commission's refusal to certify was based upon the plaintiff's physical condition, and that the plaintiff's height was not a factor in the decision (A 32), and the plaintiff was so advised (A 37). It should be obvious that it was not for the purpose of verifying the plaintiff's true height that the Commission had him examined by a disinterested Orthopedic Surgeon (A 38) and also requested him to re-take the agility test (A 40).

Even the plaintiff seems to concede at last that it was his physical condition and not his height that was really involved, for his attorney states in his Brief at p. 19: "The real issue was whether Mr. Judge's legs were strong."

While it is true that the Commission advised the plaintiff on February 6, 1973 that he did not meet the height requirement and that he would not be certified unless he did (A 33), this was while the Commission was attempting to unravel the puzzle of the height discrepancy, believing that it might be dealing with a "ringer", and before it had learned of his accident. Once this came to light, the Com-

mission was interested only in the effect of the plaintiff's injuries upon his ability to perform as a police officer. The recommendation of the Commission's examining physician (A 17-18), the formal notification of disapproval (A 37), the Commission's waiver of the height issue as a defense (A 13), its having the plaintiff submit to a third physical examination (A 38, 56-63), its offer to certify him for appointment if he could pass the agility test (A 31, 40), all demonstrate that height has never been the issue in this action.

The plaintiff insists that he disclosed his accident to the Commission's examining physician (A 51). The examining physician states that he did not (A 17), and on the form which the plaintiff filled out at the time of his physical examination he denied that he had sustained any injuries or undergone any operations during the previous five (5) years (A 20). See also A 39 at the bottom of the first column and the top of the second. Whatever the ultimate fact on this point may be, it has no relevance to the height issue.

Therefore, despite the plaintiff's contentions, there was no genuine issue of fact to be litigated on the height question and absent this, there was no federal question.

The court is not required to take the plaintiff's contentions at face value. As the court pointed out in *Trauss v. City of Philadelphia,* 159 F Supp 672, 674 (E.D. Pa. 1958):

> "If the concept of 'federal question' is to have any meaning, the court must look beyond the verbiage of a complaint to the substance of the plaintiff's grievance, and dismiss the action where no real basis for federal jurisdiction exists. (Cit. om.)."

The Supreme Court said much the same thing in *Bell v. Hood,* 327 US 678, 90 L Ed 939 (1946), at 90 L Ed 943:

> ". . . A suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial or frivolous."

The Second Circuit has declared, *Arnold v. Troccoli,* 344 F 2d 842 (1965) at page 844:

> "It is the duty of the federal courts to take note of any defects in jurisdiction of the cases before it so that the mandate of the statutes which limit jurisdiction will be observed."

See also, *Variano v. City of White Plains,* 242 F Supp 790, 793 (S.D. N.Y. 1965).

It was upon the basis of the injuries sustained by the plaintiff in his automobile accident that the Commission refused to certify the plaintiff as eligible for appointment. If it be argued that the Commission has made a mistake about the plaintiff's physical condition, such a mistake does not give rise to a federal question. The plaintiff does not establish federal jurisdiction merely by alleging the required monetary value of his claim. He must also show that his claim arises under the Constitution, laws or treaties of the United States. What this entails was stated in *Cabana Management, Inc. v. Hyatt Corporation,* 441 F 2d 862 (5th Cir. 1971), at page 864:

> ". . . To confer original jurisdiction on the federal courts under 28 U.S.C.A. § 1331 (general federal question) there must be a substantial claim founded directly upon federal law. To be substantial the claim asserted must be such that it will be supported if the Constitution and the laws of the United States are given one construction, and defeated if they receive another. A corollary of this doctrine is that when the controversy between the parties may be decided under local law without the necessity of interpreting a federal statute, there is no federal jurisdiction."

To the same effect, *Gully v. First National Bank*, 299 US 109, 114 (1936); *Midwestern Developments, Inc. v. City of Tulsa, Oklahoma*, 333 F 2d 1009, 1011 (10th Cir. 1964); *National Association for Community Development v. Hodgson*, 356 F Supp 1399, 1406 (D.C. D.C. 1973); *Aleut League v. Atomic Energy Commission*, 337 F Supp 534, 539 (D.C. Alaska, 1971).

The only real issue in this lawsuit is whether or not the Municipal Civil Service Commission was correct in its decision that the plaintiff's physical condition following his accident was such as to disqualify him from rendering satisfactory service as a Patrolman. But the resolution of this issue entails a review of the exercise of an administrative discretion by the Commission in order to determine whether the disqualification was arbitrary or capricious—or whether there was credible evidence to support the finding (*Matter of Going v. Kennedy*, 5 AD 2d 173 [1st Dept. 1958], affd. 5 NY 2d 900 [1959]; *Matter of Albury v. New York City Civil Service Commission*, 32 AD 2d 895 [1st Dept. 1969], affd. 27 NY 2d 694 [1970]; *McCabe v. Hoberman*, 33 AD 2d 547 [1st Dept. 1969]; *Matter of Farrell v. N.Y.C. Police Dept.*, 44 AD 2d 782 [1st Dept. 1974]; *Matter of Manza v. Malcolm*, 44 AD 2d 794 [1st Dept. 1974]).

Clearly, such a resolution does not depend upon the construction or application of the Constitution or of any federal law or regulation, and therefore, there is no federal question for this Court to consider.

CONCLUSION

The judgment should be affirmed.

Dated: Buffalo, New York, July ____, 1975.

Respectfully submitted,

LESLIE G. FOSCHIO,
Corporation Counsel of the
City of Buffalo,
Attorney for Defendant-Appellee,
1100 City Hall,
No. 65 Niagara Square,
Buffalo, New York 14202.

JAMES J. MCLOUGHLIN,
Assistant Corporation Counsel,
Of Counsel.